

K. R. 148909



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Manufacturing Technology Associates
Incorporated

File: B-251759

Date: April 5, 1993

Diane L. Felicijan for the protester.
Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to contracting agency's determination that protester's second-low bid was nonresponsive is academic where protester has not presented any viable basis to disturb the award to the low bidder.
2. Contracting officer properly may rely on a bidder's agreement to provide a domestic machine tool as required by the solicitation where there is no indication in the bid that a foreign product will be provided.

DECISION

Manufacturing Technology Associates Incorporated (MTA) protests the award of a contract to James McGraw, Inc. under invitation for bids (IFB) No. DLA451-92-B-1819, issued by the Defense Logistics Agency for band saws. MTA contends that its bid was improperly rejected as nonresponsive, and that the award to McGraw was improper because McGraw offered a band saw which is not domestically manufactured.

We deny the protest in part and dismiss it in part.

The IFB was issued on September 30, 1992, on an unrestricted basis, for various incremental quantities of band saws. The IFB provides that the band saws must satisfy the requirements of military specification MIL-S-45814D which, among other things, requires that the band saw be one of the manufacturer's current models. The IFB also requires that the band saw, a machine tool, be of United States or Canadian origin, i.e., be manufactured in the United States or Canada with the cost of its components manufactured in

the United States or Canada exceeding 50 percent of the cost of all components. Defense Federal Acquisition Regulation Supplement § 252.225-7016, "Restriction on Acquisition of Foreign Machine Tools." The IFB stated that bids were to be evaluated on the basis of both free on board (FOB) origin and FOB destination, and permitted bidders to submit bids based on FOB origin, FOB destination, or both.

The agency received bids from only McGraw and MTA. McGraw mistakenly certified that it was a small disadvantaged business (SDB), and subsequently supplied a corrected representation in which it indicated that this was not the case. Both bidders provided prices on a FOB origin and FOB destination basis. McGraw's FOB origin and FOB destination prices for all quantities were lower than MTA's. The agency determined that MTA's bid was nonresponsive because it did not include a completed required clause entitled "Guaranteed Maximum Shipping Weights and Dimensions." The contracting officer determined McGraw to be responsible and awarded it a contract on December 17. This protest followed.

First, the protester contends that its bid was improperly rejected as nonresponsive for failure to include a completed "Guaranteed Maximum Shipping Weights and Dimensions" clause. The agency concedes that this clause affects only the FOB origin bids. However, as we find no basis to disturb the award to James McGraw, whose bid was low for all possible quantities under both FOB origin and FOB destination, we decline to consider, as academic, MTA's protest of the agency's determination that its bid was nonresponsive. Urethane Prods. Corp., B-234694, May 25, 1989, 89-1 CPD ¶ 508.¹

Next, MTA questions the acceptability of the Peerless Model PF-115 that McGraw is to supply under the solicitation.²

¹The protester also objects that the awardee was permitted to correct its erroneous SDB certification. However, the certification and the awardee's SDB status had no effect on the award determination, as the SDB preference factor was never applied by the agency.

²In its initial protest, MTA mistakenly assumed that McGraw had offered a different model band saw and raised various objections pertaining to that model. We need not address those allegations as they are factually misplaced. In addition, MTA initially challenged the agency's determination that McGraw was responsible. Our Office will not review an agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith or misapplication of definitive responsibility

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MTA argues that McGraw's low price for this machine should "raise a flag" with procurement officials concerning whether this machine is domestic. MTA also argues that because McGraw only offers this model to the government it therefore is not a current model as required by the IFB.

First, MTA's assertion that McGraw only offers the model in question to the government is not relevant to whether the machine is a "current model." While sales to only the government might call into question whether a product is a commercial product (see Federal Acquisition Regulation § 11.001, defining "commercial product" as one sold to "the general public"), we are aware of no requirement that a "current" model of a product be one that is sold commercially. Here, McGraw indicated in its bid that it had supplied the same model to the agency within the six months preceding issuance of this IFB; we therefore see no basis for concluding that McGraw's bid took exception to the current model requirement.

As to whether McGraw offered a foreign product, the IFB required bidders to provide a domestic product and, since McGraw's bid did not take any exception to this requirement, McGraw agreed to do so. In these circumstances, unless the agency has reason to question whether a domestic product will in fact be furnished, a contracting officer is not obligated to conduct any investigation. See Sheffield Schaudt Grinding Sys. Inc., B-246699, Mar. 27, 1992, 92-1 CPD ¶ 313; Discount Mach. & Equip., Inc., B-242793, June 6, 1991, 91-1 CPD ¶ 541. There is no evidence in McGraw's bid from which the contracting officer should have been on notice that a foreign product would be furnished. McGraw's prices, which are only approximately 10 percent lower than MTA's, certainly do not raise such a question here. While MTA points out that it had previously complained to the agency that McGraw's band saw was not a domestic product, the agency had investigated the matter in response to MTA's agency-level protest of March 16, 1992, under an unrelated procurement, and found that the Peerless Model PF-115 is a domestic product that satisfied all specification requirements about which MTA had raised questions.


We also note that, in response to this protest, the agency obtained from McGraw a detailed breakdown of the costs of

²(...continued)

criteria. King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Here, while MTA alleges bad faith, its allegations merely reflect its incorrect assumption concerning which model McGraw had offered, and its belief that McGraw is not offering a domestic product, which, as discussed below, is also incorrect.

the domestic and foreign components of the Peerless Model PF-115, which clearly shows that the domestic component costs of the machine exceed 50 percent of the total component costs. Accordingly, MTA's assertion that McGraw is not offering a domestic product is without merit.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel